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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-768

UNITED TRANSPORTATION UNION, *Petitioner*

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OCTOBER TERM, 1972

No. 72-758

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

The principal characteristic of the Brief of Respondent in Opposition to the Petition is its consistent and

calculated effort to obscure, distort and minimize the reasons for granting the Writ. We shall confine our discussion to the major efforts of this sort.

1. The Respondent seeks to minimize the importance of the issues involved. We are accused of not documenting the assertion that the issue decided below is "of huge importance" (Br. Opp., p. 8). It is not deniable that the Court below engrafted upon the decision of this Court in 1971 (Pet. App. F, p. 60a) a requirement that a major dispute under the Railway Labor Act (RLA) must be remediated if it should be found that one of the parties did not discharge its obligation under Section 2, First, of the RLA, which this Court defined only as having exhausted the procedures of the Act with "a desire not to reach an agreement" (Pet. App. F, p. 67a).

This Court in its decision and disposition of this case in 1971 recognized that it was creating important questions of first impression which it might ultimately have to consider (Pet. App. F, pp. 60a, 63a and 73a). Respondent's assertion is indeed surprising in view of the argument made by counsel for Respondent in the District Court in November, 1971. At the conclusion of the evidentiary hearing conducted by the District Court, counsel for Respondent then stated: "As your Honor indicated, it is a case of first impression, involving, as your Honor noted the other day, what is essentially breaking new ground in the law of railway labor act interpretation. Therefore, we conceive it to be a very important case indeed." (Tr. November 18-19, 1971, p. 315).

2. Next, Respondent distorts the questions presented into a single question begging generalization (Br. Opp., pp. 1-2). By this device, Respondent seeks to obscure

the several questions for the resolution of which this Court remanded the case for determination—whether there had been a violation of Section 2, First, in circumstances justifying a strike injunction (Pet. App. F, p. 73a), which necessarily involved the RLA and the Norris-LaGuardia Act (N-LaG Act).

3. Respondent mistakenly tells us (Br. Opp., pp. 3-4) that the District Court enjoined the union from striking until it "exhausted the procedures required by the Act—including mediation—in compliance with Section 2, First." The Respondent does not tell us that the reference is to an interlocutory conclusion of the District Court on August 13, 1971. The District Court did then conclude that there had not been as to this dispute "the sort of mediation contemplated by the Act," but it also concluded, "The Court has no statutory authority to remand the controversy to the Mediation Board" (Pet. App. E, p. 57a).

Furthermore, Respondent does not tell us that at the final hearing before the District Court on November 18-19, 1971, it tried to convince the District Court that the August 1971 interlocutory decree required remediation and that the Court disclaimed any such intention (Tr. November 18-19, 1971, pp. 9-11, 327-329). In the District Court's final disposition of the matter on December 22, 1971, the District Court then found and concluded that both parties had fulfilled their obligations under Section 2, First, of the RLA and again concluded it had "no statutory authority to remand the controversy to the Mediation Board" (Pet. App. D, p. 45a).

4. Perhaps most important, Respondent distorts the bases upon which Petitioner seeks review by this Court of the decision below. This has two aspects:

A. The Respondent does not fairly meet our contention as to the conflict between the decision below and the decision of this Court in 1971. Respondent first asserts the decision of the Court below does not conflict with any decision of this Court and complies with this Court's prior decision in this case and states a contention which we did not make that "The union apparently contends that there are no sanctions for one who has violated Section 2, First, the very issue settled to the contrary by this Court in its 1971 decision in this case" (Br. Opp., p. 7). Respondent seemingly bases its argument upon the fact that this Court did not determine the procedure to be followed if the lower courts should find a violation by the union of Section 2, First, and bases its contention upon an argument in the dissent that, in the event a violation of Section 2, First, should be found, the parties should be remanded to some unspecified point in the exhausted procedures of the RLA (Br. Opp., pp. 6-8), for which the dissent also argued there was no authority (Pet. App. F, p. 86a).

This Court remanded the case for the lower courts to determine whether there had been violation of Section 2, First, of the RLA by the union, i.e., whether the union in exhausting the procedures of the Act did so with a desire not to reach an agreement in circumstances justifying a strike injunction. Petitioner recognizes that the decision of this Court did impose sanctions—a judicial proceeding subsequent to exhaustion of the procedures of the RLA to determine whether there had been compliance with Section 2, First, and, if not, for the Courts to require compliance with Section 2, First, but without remanding the parties to revisiting any of the procedures of the RLA theretofore

exhausted and to maintain the status quo by injunction until such could be done.

The Court below did not decide whether the District Court correctly determined that both parties had complied with Section 2, First, but, instead, avoided deciding that question by tacking onto the obligation of the parties under Section 2, First, as defined by this Court, the requirement that the parties re-visit each of the steps of the RLA procedures, although this Court did not contemplate nor suggest that such was the obligation of the parties under Section 2, First, of the Act and certainly did not impose any such requirement upon the parties.[1]

B. The Respondent also distorts the extent to which we claim conflict with the decision of other Courts of Appeals. We are told that the decision below is consistent with the decision of the Court of Appeals for the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Airline Pilots Ass'n,* 416 F.2d 633. Neither the opinion cited nor the decision of this Court in 1971 made any suggestion of re-visiting any of the steps in the procedures of the RLA; the fact is that we did not even cite that case in the Petition, since that part of the opinion dealing with Section 2, First, of the RLA in the event the dispute should be found to be a major dispute had been reduced to dictum by a subsequent holding that the case involved a minor dispute, rather than a major dispute (347 F.Supp. 363 (D.C. M.D.

[1] In arguing the case in the District Court in November, 1971, Respondent's counsel admittedly could find no basis in this Court's opinion to support the argument that the District Court should require re-mediation; he admitted that his reliance was upon the dissent. (Tr. November 18-19, 1971, pp. 9-10, 326-329).

N.Car., August 10, 1972)). It is only by taking words and clauses from the decision in the *Piedmont* case out of context and interpolating them that the Respondent would make it appear that the Court of Appeals' opinion in that case carried some suggestion that the revisitation of mediation was required.

Next, the Respondent mis-states our contention as to the conflict between the decision below and the 1967 decision of the Court of Appeals for the D.C. Circuit in *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (Br. Opp., p. 9). Our claim of conflict between the decision below and the *Akron and Barberton Belt* case is that there is an inconsistency between the Seventh Circuit's treatment of the 1971 conferences as fulfilling only the initial conference requirements of the Railway Labor Act and the D.C. Circuit's holding in the *Akron and Barberton Belt* case that the carrier had forsaken any right to initial conferences.

5. The Respondent confuses a number of highly important issues, including the necessity for mediation under the RLA and the N-LaG Act, into a dissertation as to whether mediation is "permissive". These issues need to be sorted out and dealt with separately.

A. There is no doubt that, under Section 5, First, of the RLA, if either party invokes mediation or if the Mediation Board proffers it, mediation is mandatory and not permissive. But, no such question is involved in this case.

B. Respondent bases an argument on the refusal of the Petitioner to join with it in invoking mediation just before the final hearing in the District Court in

November, 1971 (Br. Opp., p. 11). From this circumstance the Respondent spells out several completely unfounded conclusions:

(i) The Petitioner is alleged to have failed to exhaust the procedures of the RLA even though there is nothing in that Act requiring either party to invoke mediation; the alleged duty is completely contrary to the specific wording of Section 6, of the RLA, which gives the right of self-help to either party when ten days have elapsed without invocation of mediation or a proffer of mediation; and Respondent brushes aside as dictum the exposition of these provisions of Section 6 in *International Ass'n of Machinists* v. *N.M.B.*, 425 F.2d 527 (D.C. Cir., 1970) (Br. Opp., p. 12, fn. 4).

(ii) Respondent completely ignores its own failure to invoke mediation and appears to suggest that its ability to invoke mediation was somehow dependent upon the Petitioner joining with it in the invocation; no such joinder is required.

(iii) Respondent then seeks to excuse itself from its failure to invoke mediation as a pre-requisite to obtaining an anti-strike injunction, notwithstanding Section 8 of the N-LaG Act and the decision of this Court in *Brotherhood of R.R. Trainmen* v. *Toledo P&W R.R.*, 321 U.S. 50.

C. The Respondent makes it clear, albeit in footnotes, that it is now taking a completely radical and unsupported position with respect to two points concerning the RLA and the N-LaG Act (Br. Opp., pp. 11-12, fn. 3 and 4).

(i) Respondent undertakes to demonstrate that Section 8 of the N-LaG Act is not applicable to injunctions

based on alleged "violations" of the RLA. In doing so, it relies principally on cases cited by this Court in its 1971 decision (Pet. App. F, p. 72a) showing that injunctions are available to enforce the "mandates" of the RLA. Those cases did not involve anti-strike injunctions but Respondent, in arguing its point (Br. Opp., p. 11, fn. 3), treats all the cases as indifferently establishing an excision of Section 8 of the N-LaG Act from any applicability to any alleged violation of the RLA. In so doing, the Respondent completely ignores the careful limitation that this Court placed on its own inferences from these cases with respect to anti-strike injunctions (Pet. App. F, pp. 72a-73a).

(ii) Respondent is now telling us (Br. Opp., p. 12, fn. 4), in spite of the plain language of Section 6 of the RLA and the exposition of that language in *International Ass'n of Machinists* v. *N.M.B.*, 425 F.2d 527, 537 (D.C. Cir., 1970), that a party seeking to exercise self-help under the RLA has an obligation to invoke mediation as a condition precedent thereto. Thus, in footnotes 3 and 4 the Respondent comes full turn: It would eliminate its obligation under Section 8 of the N-LaG Act to have sought mediation and arbitration as a prerequisite to obtaining an anti-strike injunction; instead, it would impose an obligation to invoke mediation on a party seeking self-help. There is no authority whatever for Respondent's positions.

CONCLUSION

The Brief in Opposition when carefully analyzed fails to establish the aura of unimportance of review by this Court but, instead, the questions raised by it emphasize the necessity for this Court to settle the important questions of first impressions which stem from

this Court's decision in this case in 1971. The Writ of Certiorari should be granted.

Respectfully submitted,

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